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SUPREME COURT, U.S.

No. 06-1351

IN THE

Supreme Court of the United States

ANDRE MERDJANIAN, Individually and as Administrator of the ESTATE OF SONIA T. MERDJANIAN, Deceased, RAFFI MERDJANIAN and ANDRE MERDJANIAN,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition and review the decision of the Court of Appeals of the Third Circuit wherein, in affirming summary judgment in favor of Respondent, Nationwide Mutual Insurance Company, the Court of Appeals for the Third Circuit analyzed, factually distinguished and was not persuaded by a decision of the Pennsylvania Superior Court, an intermediate appellate court, which involved the same issue but involved materially different facts.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Nationwide Mutual Insurance Company, has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1 – 9) is unreported and is not precedential. The opinion may be found at 195 Fed. Appx. 78 and 2005 U.S. App. LEXIS 23902.

The Opinion of the United States District Court for the Eastern District of Pennsylvania (Pet. App. 12 – 27) is unreported. The opinion may be found at 2005 U.S. Dist. LEXIS 3493.

STATUTES INVOLVED

75 Pa. C.S.A. § 1791 (West 2006)

Purdon's Pennsylvania Statutes and Consolidated Statutes Annotated

§ 1791. Notice of available benefits and limits

It shall be presumed that the insured has been advised of the benefits and limits available under this chapter provided the following notice in bold print of at least ten-point type is given to the applicant at the time of application for original coverage, and no other notice or rejection shall be required:

IMPORTANT NOTICE

Insurance companies operating in the Commonwealth of Pennsylvania are required by law to make available for purchase the following

benefits for you, your spouse or other relatives or minors in your custody or in the custody of your relatives, residing in your household, occupants of your motor vehicle or persons struck by your motor vehicle:

(1) Medical benefits, up to at least $ 100,000.

(1.1) Extraordinary medical benefits, from $ 100,000 to $ 1,100,000 which may be offered in increments of $ 100,000.

(2) Income loss benefits, up to at least $ 2,500 per month up to a maximum benefit of at least $ 50,000.

(3) Accidental death benefits, up to at least $ 25,000.

(4) Funeral benefits, $ 2,500.

(5) As an alternative to paragraphs (1), (2), (3) and (4), a combination benefit, up to at least $ 177,500 of benefits in the aggregate or benefits payable up to three years from the date of the accident, whichever occurs first, subject to a limit on accidental death benefit of up to $ 25,000 and a limit on funeral benefit of $ 2,500, provided that nothing contained in this subsection shall be construed to limit, reduce, modify or change the provisions of section 1715(d) (relating to availability of adequate limits).

(6) Uninsured, underinsured and bodily injury liability coverage up to at least $ 100,000 because of injury to one person in any one accident and up to at least $ 300,000 because of injury to two or more persons in any one accident or, at the option of the insurer, up to at least $ 300,000 in a single limit for these coverages, except for policies issued under the Assigned Risk Plan. Also, at least $ 5,000 for damage to property of others in any one accident.

Additionally, insurers may offer higher benefit levels than those enumerated above as well as additional benefits. However, an insured may elect to purchase lower benefit levels than those enumerated above.

Your signature on this notice or your payment of any renewal premium evidences your actual knowledge and understanding of the availability of these benefits and limits as well as the benefits and limits you have selected.

If you have any questions or you do not understand all of the various options available to you, contact your agent or company.

If you do not understand any of the provisions contained in this notice, contact your agent or company before you sign.

28 U.S.C.S. § 1652 (West 1994)

United States Code Annotated

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

Nationwide Mutual Insurance Company ('Nationwide") brought this action in the District Court seeking declaratory judgment pursuant to 28 U.S.C.A. § 2201. The jurisdiction of the District Court was based on diversity of citizenship and amount in controversy pursuant to 28 U.S.C.A. § 1332.

Summary judgment was granted to Nationwide on the issue of the effect of a written election of lower limits of uninsured motorist benefits signed by Petitioner Andre Merdjanian when the Nationwide policy of automobile insurance was issued to him in 1990. The District Court found that Nationwide was not required to obtain a new written request for lower limits when Andre Merdjanian increased his bodily injury liability limits in 1998. The Third Circuit Court of Appeals affirmed the decision.

In July 1990, Petitioner Andre Merdjanian met with Rocco J. Polidoro, the owner of an agency that sells and services Nationwide products, and signed an Application for

Auto Insurance. In that application, Mr. Merdjanian requested bodily injury liability coverage limits of $25,000 each person and $50,000 each occurrence. [Pet. App. 13]. He also requested in the application uninsured and underinsured motorist coverage limits of $15,000 each person and $30,000 each occurrence. At the time of the application in July 1990, Mr. Merdjanian also signed an Uninsured Motorist Coverage Authorization Form selecting limits of $15,000 each person and $30,000 each occurrence. [Pet. App. 1, 13]. Mr. Merdjanian was provided with the notice prescribed by section 1791 of the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa. C.S.A. § 1791, advising of the benefits and limits available. [Pet. App. 7].

Subsequent to the issuance of the policy in 1990, Mr. Merdjanian made changes to the policy, including to add or replace vehicles. [Pet. App. 1, 2]. In August 1998, Mr. Merdjanian increased the bodily injury liability limits from $25,000 each person and $50,000 each occurrence to $100,000 each person and $300,000 each occurrence. [Pet. App. 1]. The Polidoro Agency sent two forms, UM 2 and UIM 2, to Mr. Merdjanian in September 1998 for him to sign if he wanted to change his uninsured or underinsured motorist coverage. [Pet. App. 13]. The forms were never signed by Mr. Merdjanian or returned to Polidoro or Nationwide. [Pet. App. 13]. Mr. Merdjanian contended before the District Court that he never received the forms. [Pet. App. 13]. In the Petition, Petitioners contend, with no record support, that the forms were received and not signed "because he did not want his UM/UIM limits to be less than his liability limits of $100,000 each person and $300,000 each occurrence". [Pet. 6].

On April 17, 2001, Mr. Merdjanian met with Rocco Polidoro to make changes including adding a Honda and adding one of his sons as a driver. [Pet. App. 14]. Mr. Merdjanian contended that in the meeting he requested "full coverage". [Pet. App. 14]. On April 23, 2001, Nationwide issued a Declarations Page to Andre Merdjanian stating bodily injury liability limits of $100,000 each person and $300,000 each occurrence and uninsured and underinsured motorist limits of $15,000 each person and $30,000 each occurrence. [Pet. App. 2]

On June 10, 2001, Andre Merdjanian's wife, Sona, was involved in an accident with an uninsured motorist while operating one of the vehicles listed on the Nationwide policy. [Pet. App. 14]. Sona Merdjanian died as a result of the accident. [Pet. App. 14]. The sons, Hagop and Raffi Merdjanian, were passengers at the time of the accident.

Petitioners sought uninsured motorist coverage benefits from Nationwide for the June 10, 2001 accident and claimed that the limits of uninsured motorist coverage should be the same as the bodily injury liability limits of $100,000/$300,000 because Nationwide did not obtain a new election of lower limits after the bodily injury liability limits were increased in 1998.

It is not disputed that the Nationwide auto policy included bodily injury liability limits of $100,000/$300,000 and uninsured motorist coverage limits of $15,000/$30,000 from August 1998 through the time of the motor vehicle accident of June 10, 2001. Nationwide sent out to Mr. Merdjanian, Declarations Pages reflecting these coverages, including a Declarations Page sent before the accident of June 10, 2001 which reflected the changes made after the April 2001 meeting. [Pet. App. 9]. Mr. Merdjanian paid the premium based on the coverage amounts shown in the Declarations Page. [Pet. App. 9].

REASONS FOR DENYING THE PETITION

Petitioners have not come forward with any compelling reason for this Court to review the decision of the Third Circuit Court of Appeals. The only reason advanced in the Petition is Petitioners' view that the Third Circuit's decision is in direct conflict with Pennsylvania law. The Pennsylvania law that is cited by Petitioners is the decision by the Pennsylvania Superior Court in *Blood v. Old Guard Insurance Co.*, 894 A.2d 795 (Pa. Super. 2006), *petition for allowance of appeal granted.* The opinion of an intermediate appellate state court is "a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West v. AT&T Co.*, 311 U.S. 233, 237, 61 S. Ct. 179, 85 L. Ed. 139 (1940).

The Third Circuit Court did not disregard the Pennsylvania Superior Court's opinion in *Blood.* To the contrary, the Third Circuit Court distinguished *Blood* factually and further stated that it was not persuaded that *Blood* required the Court to rule in favor of Merdjanian. [Pet. App. 7].

In *Blood*, Michael and Sharon Blood, the named insureds under an automobile insurance policy issued by Old Guard Insurance Company, signed an election of lower uninsured and underinsured motorist coverage (UM/UIM) requesting $35,000 per occurrence with stacking when they applied for the insurance in 1986. The liability coverage they requested at the time of the application was $500,000. In June 2000, the Bloods signed a change request form provided by Old Guard indicating by check mark a request for a reduction of the liability coverage to $300,000. The form included options

for different levels of UM/UIM coverage under separate headings for each. There were no check marks next to any of the UM/UIM options.

In August 2000, the Bloods' son, Jay, was injured in a motor vehicle accident and sought underinsured motorist coverage from Old Guard after collecting the liability limits under the driver's policy. Old Guard paid Jay Blood $105,000 representing a $35,000 limit on the UIM coverage for three stacked vehicles. Jay Blood filed a declaratory judgment action seeking a determination as to the UIM limits under the Old Guard policy.

Blood advanced the argument that the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL), 75 Pa. C.S.A. § 1701 *et seq.*, requires the UIM coverage be the same as the liability coverage because his parents did not choose a lower level of UIM coverage when they decreased the liability coverage under the Old Guard policy.

In *Blood*, in beginning its analysis of this issue, the Pennsylvania Superior Court referred to its decision in *Smith v. The Hartford Ins. Co.*, 2004 Pa. Super. 145, 849 A.2d 277 (Pa. Super. 2004) *appeal denied*, 581 Pa. 708, 867 A.2d 524 (2005) in which it found that the subsequent purchase of higher liability limits does not act to obviate a previous *rejection* of UIM coverage. In *Blood*, the Superior Court noted language in the *Smith* decision concerning "sign-down" cases, or cases in which the insured submits a written request for limits of UM/UIM coverage that are lower than the liability limits.

In *Smith*, with respect to the "sign-down" issue, the Superior Court stated:

> Case law indicates that when the liability limits change a new request for lower limits must also be submitted or the statutorily mandated equal limits will apply. See generally *Cebula v. Royal & Sun Alliance Inc. Co.*, 158 F. Supp. 455 (M.D. Pa. 2001)[*sic*].

Smith, 849 A.2d at 281.

However, in *Blood*, in concluding that the UIM coverage limit of the Old Guard policy was increased to be the same as the revised bodily injury liability coverage limit, the Superior Court focused on the particular form used by Old Guard and the presence of options for declaring the UIM and UM coverage limit, stating:

> Had these options not been present on the face of the form signed by the Bloods, Old Guard's contention that the form was capable only of modifying the liability coverage of the policy may have had some merit. However, those are not the facts presently before the Court.

Blood, 894 A.2d at 798.

The Superior Court further stated with respect to the form signed by the Bloods:

> Of course, as the party responsible for drafting the document, Old Guard was capable of protecting itself from such results. It could have dedicated forms for modification of each type of coverage limit.

Id.

The Third Circuit Court in this case considered the Superior Court opinion in *Blood* stating:

> However, in *Blood*, the insured had been presented with a 'change request form' containing sections pertaining to both liability and UM/UIM coverage. This alone distinguishes *Blood* from the present case.

[Pet. App. 7].

The Third Circuit Court went on to state that *Blood* was not a decision by the Supreme Court of Pennsylvania, that there was no decision of the Pennsylvania Supreme Court dealing with the precise issue, and that, "it is well-established that Pennsylvania inferior courts may influence our opinion if we are persuaded by their analysis." However, the Third Circuit Court further stated that "[w]e are not persuaded here that *Blood* requires us to rule in favor of Merdjanian." (Pet. App. 7).

In its analysis, the Third Circuit Court discussed the applicable sections of the Pennsylvania Motor Vehicle Responsibility Law, 75 Pa.C.S.A. § 1701 *et seq*. and decisions of the Pennsylvania Supreme Court with respect to certain of those sections. The Third Circuit Court noted that Nationwide had provided Merdjanian with the notice prescribed by section 1791 of the MVFRL stating:

> Under section 1791, once an insurance applicant has been informed of the available choices for UM/UIM coverage, and opted to reject or reduce such coverage in conformity with the requirements of section 1731 and 1734, the insurer has no

> further obligation to provide notice or rejection with regard to UM/UIM coverage. Here, Nationwide provided Merdjanian with the notice prescribed by section 1791 and obtained his written application for reduced UM/UIM coverage in the amount of $15,000/$30,000. Nothing more was required.

[Pet. App. 7].

Further, as pointed out by the dissent in *Blood* and by the District Court in this case[1], the majority decision in *Blood* relied on dicta from *Smith*. The Superior Court dicta in *Smith* relied on *Cebula v. Royal & SunAlliance Ins. Co.*, 158 F. Supp. 2d 455 (M.D. Pa. 2001), a case that is clearly distinguishable. In *Cebula*, the insureds had *never* signed a written request to have the UM/UIM coverage be lower that the bodily injury coverage.

The distinguishing facts of *Blood* and the flaws in the Superior Court's analysis were also noted in *State Farm Mutual Automobile Ins. Co. v. Hughes*, 438 F. Supp. 2d 526 (E.D. Pa. 2006), a decision that was issued before the Third Circuit Court's decision in this case.

The Rules of Decision Act, 28 U.S.C.A. § 1652 (West 1994), provides that the laws of the several states, except

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1. As noted in *State Farm Mutual Auto Ins. Co. v. Hughes*, 438 F. Supp. 2d 526, 543 (E.D. Pa. 2006), the District Court's decision in *Merdjanian* analyzed a December 30, 2004 panel decision by the Superior Court in *Blood*. This decision was subsequently vacated and replaced by the en banc Superior Court *Blood* decision issued on March 2, 2006. However, the en banc court's analysis is consistent with the analysis of the panel as described by the District Court in *Merdjanian*.

where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. The highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted. *West v. AT&T Co.*, 311 U.S. 233, 237, 61 S. Ct. 179, 85 L. Ed. 139 (1940).

This Court has found, in certain situations, that the decisions of state intermediate courts should be followed by a federal court in deciding a state question. In *West*, this Court stated that the Court of Appeals for the Sixth Circuit was not free to reject the decision of the intermediate state appellate court of Ohio merely because it had not received the sanction of the highest state court. In *West*, the court of appeals of Ohio had previously decided the *same case* between the *same parties*. The Supreme Court of Ohio had declined to review the decision.

In *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 61 S. Ct. 176, 85 L. Ed. 109 (1940), this Court found that the Court of Appeals for the Third Circuit was wrong to disregard two decisions of the Chancery Court of New Jersey which were not reviewed by the Court of Errors and Appeals, the highest state court. Significantly, this Court noted that the Third Circuit Court found it impossible to distinguish the facts in the two Chancery cases from those shown in the case before it.

This case does not present a situation in which the Third Circuit Court of Appeals was required to follow a decision by a Pennsylvania intermediate appellate court.

In this matter, there is a single state court case that has addressed the issue presented to the Third Circuit Court and that case is *Blood*. The Third Circuit Court distinguished *Blood* on the facts. Given the focus of the Superior Court in *Blood* on the particular form used by Old Guard, there is no assurance that the Superior Court itself would arrive at the same conclusion under the facts of this case. Further, the Third Circuit Court was not persuaded by the analysis in *Blood*. The analysis in *Blood* has been criticized because it relies on dicta and the dicta relies on a case that is clearly distinguishable. Finally, the Pennsylvania Supreme Court has accepted *Blood* for review so its continued viability is in question.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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